United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7465, 76-7066

ORIGINAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSE FERNANDEZ,

Plaintiff,

—against—

CHIOS SHIPPING CO., LTD.,

Defendant and Third Party Plaintiff-Appellee,

—against—

MAHER STEVEDORING COMPANY, INC.,

Third Party Defendant-Appellant,

and

STATES MARINE LINES, INC.,

Third Party Defendant-Appellee.

CHIOS SHIPPING CO., LTD.,

Fourth Party Plaintiff,

—against—

CASTLE & COOKE, INC., DOLE CORP. and CASTLE & COOKE FOODS CORPORATION,

Fourth Party Defendants-Appellants.

BRIEF FOR THIRD PARTY DEFENDANT-APPELLEE STATES MARINE LINES, INC.

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TABLE OF CONTENTS

Cases Cited

Rule Cited

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Issues Presented for Review

The issues presented in the appeals by the stevedore and the shipper requiring them to indemnify the shipowner and the charterer, are as follows:

1. Where there is sufficient uncontradicted evidence to substantiate the findings of fact of the jury that the third party defendant-appellant Maher Stevedoring Company, Inc. (Stevedore) breached its warranty of workmanlike performance, can these findings be considered "clearly erroneous."?

2. Where the Time Charterer, third party defendant-appellant States Marine Lines, Inc. (Time Charterer) agreed to load, stow, trim and discharge cargo at their expense under the supervision of the captain, did the lower Court err in holding that the Time Charterer warranted the safe and proper performance of loading and discharging cargo and breached the warranty?

3. Where the fourth party defendant-appellant, Castle & Cooke, (Manufacturer-Shipper) admitted engagement in the manufacture and/or sale or distribution of pineapple packaged in cans and cartons and prepalletized for shipment, transportation, handling or discharge aboard ocean going vessels and that it expressly undertook to provide a safe, seaworthy and properly palletized package of cartons of pineapples, and the jury found that the pallet supporting prepalletized cargo came apart and was a proximate cause of plaintiff's accident, should this court direct the lower court to enter judgment in favor of the shipowner against the Manufacturer-Shipper?

4. Is there sufficient evidence in the record to support a finding that there was a latent defect in the pallet on which cartons of pineapple were stowed and that the defect existed at the time it left the Manufacturer-Ship-

per's possession. If so, this court should direct the lower court to enter judgment in favor of the defendant, third and fourth party plaintiff-appellee (Shipowner) against the Shipper?

5. Is there sufficient evidence in the record to support a finding that the Manufacturer-Shipper breached its warranty of fitness for use in shipping cargo on defective pallets. If so, this court should direct the lower court to enter judgment in favor of the Shipowner against the Shipper?

6. Where there is sufficient uncontradicted evidence to substantiate the findings of fact of the jury that Castle & Cooke (Manufacturer-Shipper) shipped prepalletized cargo upon a latently defective pallet, that it was negligent and the defective pallet was a proximate cause of Plaintiff's injury, can these findings be considered "clearly erroneous"?

7. Did not the trial judge properly exercise her discretion in rulings on relevancy of evidence and did not the trial judge properly admit records procured in the ordinary course of business?

8. Does not the record as a whole warrant the denial of the claim that the trial court committed prejudicial procedural errors?

Statement

This brief is submitted by the third party defendant-appellee, States Marine Lines, Inc., in answer to the briefs and the issues presented therein of third party defendant-appellant, Maher Stevedoring Company, Inc. and fourth party defendants-appellants, Castle & Cooke, Inc., Dole Corp., and Castle & Cooke Foods Corporation.

To avoid duplicity, third party defendant-appellee, States Marine Lines, Inc. (Isco) respectfully refers this Honorable Court to the complete statement of the case and its facts as set forth in Isco's brief as third party defendant-appellant seeking reversal from the opinion and order of the Trial Court requiring Isco to indemnify Chios for the amount awarded by the jury to the plaintiff longshoreman, together with reasonable costs and counsel fees incurred by Chios in its defense of the primary action.

AS TO THE STEVEDORE

POINT I

Isco, time charterer, if obligated to indemnify Chios, shipowner, is entitled, based upon the correct determinations of the jury and the Court below to indemnify in full from Maher, including reasonable costs and counsel fees.

After the finding by the jury that the injured plaintiff longshoreman was entitled to recover against Chios shipowner, on the basis of unseaworthiness, the claims of these parties claiming indemnity were submitted to the jury and by its answers to special interrogatories, the jury found, in effect, that Chios, shipowner, and Isco, time charterer, were entitled to indemnity from Maher, stevedore and Castle & Cooke, the shipper (34a-36a). The jury also found that Maher was entitled to indemnity from Castle & Cooke. The Court below, in its post trial opinion and in ruling on the various motions for directed verdicts, held that Chios was entitled to indemnity from Isco and confirmed that Chios was entitled to indemnity on the jury findings from Maher and Cas-

tle & Cooke. The Court below, in its opinion and order, simultaneously ruled that Isco was entitled to indemnity, including reasonable costs and counsel fees from Maher and Castle & Cooke (26a).

Isco retained and paid for the services of Maher, an expert stevedore, to discharge cargo from the holds of the SS CHIOS at Port Newark, New Jersey. At a given moment and during the process of Maher's discharge of pre-palletized cartons of pineapple from No. 3 lower hold, the wooden pallet of a unit supporting the draft of cartoned pineapple broke while being lifted from the square of the hatch causing the unit to come apart and resulting in one or more of the falling cartons striking and injuring the plaintiff, a holdman.

Maher argues, in its appeal from the jury's determination, that it is not liable to indemnify Chios and Isco; that the sole, proximate cause of the accident of September 1, 1968 was the latent defect in the pallet bearing the pre-palletized unit; that the jury's finding that Maher had breached its warranty of workmanlike performance was clearly erroneous and that, as a matter of law, judgment should have been entered in favor of Maher with respect to the indemnity claims of Chios and Isco. The record lends no support to Maher's argument. The evidence at trial clearly showed that the discharging operation was in the exclusive control of Maher, the stevedore, and its employees only were engaged in discharging the pre-palletized cargo from No. 3 lower hold. The proven facts show that in the course of undertaking to discharge the pre-palletized units from the No. 3 lower hold, Maher performed the discharging operation in such a manner so as to require its employees to work in a precariously confined area, affording the longshoreman no sanctuary within the perimeter of the square of the hatch as drafts were being raised thus exposing the longshoreman to risks and

hazards and that Maher otherwise failed to supervise properly the discharge operation and provide for the safety of its employees during that operation.

During the discharge of cargo, Maher created a condition exposing its employees to danger. Cargo was removed from No. 3 lower hold in such a negligent way that the stevedore created by its improper performance a condition which, in and of itself, rendered the ship unseaworthy as reflected by the jury's specific findings (38a, 33a-36a). The proof at trial demonstrated that there was little room for the longshoreman to work in and about the hatch square area (89a, 90a). Maher's safetyman was not in attendance from the beginning of the operation up to the time of the accident (80a). No warnings were given by the signalman and the hatch boss of No. 3 hold. Indeed, the foreman of the longshoring gang at that hatch was not about that morning, a significant probative fact admitted by Maher. At the trial and through the cross-examination of the plaintiff by counsel for Isco, the unsafe conditions created by Maher, through the method it chose to discharge the drafts of cargo, was demonstrated. Such cross-examination was intended to explore the issue as to whether or not the plaintiff was himself contributorily negligent in standing beneath the heavy draft as it was being lifted overhead. Pertinent portions of that testimony are as follows:

> "Q. Was there a ceiling or an overhead over your head when you hooked up the draft?
>
> A. No, I can't tell you.
>
> Q. Was it open?
>
> A. In order for the draft to go up, it must have been open.
>
> Q. Now, after you hooked the bar onto the pallet, did you step away from it?
>
> A. I couldn't do much. The drafts of these palletized cargo, there isn't much space; perhaps two

feet. The hatch was still full of palletized cargo on that side. There was no place to hide.

Q. How much space was there between where you hooked on to the pallet and the nearest stow of cargo?

A. I can't tell you.

Q. Could you walk into the wing of the hatch just before the accident?

A. What do you mean by the wing? I don't understand you.

Q. Into the side of the ship.

A. There was no space at all. There was cargo all around the hatch and I think that the cargo was stowed maybe two or three high of these palletized cargo.

Q. Did anyone before the accident, at any time when any of the drafts were being removed, tell you to stand clear?

A. Where was I going to stand clear? There was no place. I am sorry. There was no space at all. We were just starting to discharge this cargo. We had just begun discharging this cargo up there and there was no space." (298a, 299a)

* * *

"Q. At any time during the morning, from the time you worked until the time of your accident, were you told to stand clear of a draft as it was being lifted?

A. I don't remember anything about that.

Q. Was there any man in the hold that was giving directions with respect to the lifting of the drafts?

A. It was about lunchtime, and down in the hatch nobody told me anything about directions at all." (299a, 300a)

* * *

"Q. At any time would you stand under a draft as it was being lifted? That is my question?

A. You had to work down there and down in that hatch there was no place for you to go to any side.

Q. You didn't have the room, is that what you are saying?

A. Exactly.

Q. Did you complain about the lack of any room to work in to anybody at Maher Stevedoring?

A. I am sorry, but I didn't complain about anything." (300a, 301a)

* * *

"Q. What is a signalman?

A. There is a gentleman who gives signals on the main deck.

Q. Could you see him from where you were working in the hold were you to look up?

A. Yes, you have to see him.

Q. Did he call down to you or people you were working with during the morning of September 1, 1968 for any reason?

A. To me, no sir.

Q. To anyone?

A. I don't know.

Q. Did he ever call down to you or anyone else in the gang to stand clear?

A. To stand clear of what?

Q. Of the draft which was being lifted?

A. I don't remember anything about that, no.

Q. Do you admit that you should, as a longshoreman of experience, stand clear of a draft as it is being lifted if you had the room?

A. There wasn't any room.

Q. I am saying if you had the room?

A. We were just beginning in the square and there wasn't any room." (300a, 301a)

The undisputed proof therefore was that the longshoremen, including the plaintiff, were required, due to the unsafe method of discharge adopted by their employer, Maher, to stand beneath the ever present dangers presented by the suspension of a heavy draft of cargo overhead. It was on these proven facts that the jury determined that the plaintiff was not contributorily negligent (468a), that Maher had breached its warranty of workmanlike performance by failing to properly supervise and direct its employees with respect to the unloading operation and to provide for the safety of its employees and that the stevedore's breach of duty was a concurring, proximate cause of the plaintiff's injuries (34a). Importantly, it was otherwise decided that the ship and/or its agents did not know or should have known of the unsafe condition, that they did not acquiesce in the longshoremen working under such conditions (35a) and that there clearly was no evidence of any conduct on Isco's part such as to preclude indemnity from Maher, the stevedore, and Castle & Cooke, the shipper (26a).

The credible trial evidence showed that Maher adopted an unsafe procedure in the method of discharge by constraining its employees to work beneath the ever present danger represented in a suspended heavy lift. Fair minded men, from their every day experiences, could quickly reason, as they did in this case, that the method undertaken to discharge was hazardous and unsafe. Maher presented no proof otherwise. The finding of fact that Maher had breached its warranty to Chios and Isco was consistent with the uncontradicted proven facts and was not erroneous.

Maher places undue reliance on the decision of the Fifth Circuit in *Scott* v. *SS Ciudad de Ibague*, 426 F. 2d 1105. In *Scott*, supra, longshoremen were discharging sacks of coffee from a stow in the 'tween deck of a vessel and

they were to pull the sacks down from the stow and place them on pallet boards for removal. The sacks, which had not yet been pulled down, appeared to be stacked in a normal manner and there was no apparent defect in the stow yet for some unexplained reason, a number of the sacks of coffee fell without warning and injured Scott. The shipowner's claim for indemnity against the stevedore was disallowed upon the finding that it had not been guilty of conduct which would constitute a breach of its warranty of workmanlike performance. The significant difference factually and thus legally between *Scott,* supra and this case on appeal is that in *Scott,* the evidence was that the ". . . procedures used by the longshoremen were customary and ordinary." *Scott,* supra at p. 1106. In this case on appeal, the record is replete with clear, uncontradicted evidence that the procedures were not customary and ordinary since longshoremen were constrained to work in a confined space; that there was no room within the wings of the hold to provide them with sanctuary as they stood in the hatch square beneath heavy drafts of an average weight of approximately one and three-quarter tons and the operation went unsupervised. Maher should find no comfort from *Scott,* Supra, as the facts in that case are inapposite to the proven facts of this case on appeal from which the jury fairly concluded that Maher had failed to properly supervise the discharge and provide for the safety of its employees.

Maher was under a legal duty to perform its stevedoring services in a workmanlike and competent manner. *Ryan Stevedoring Co.* v. *Pan Atlantic SS Corp.,* 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133; *Crumady* v. *The Joachim Hendrik Fisser,* 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413. Maher's obligation to perform its services in a workmanlike manner arose out of the service undertaken *Crumady* v. *The Joachim Hendrik Fisser,* Supra;

Waterman SS. Corp. v. *Dugan & McNamara, Inc.*, 364 U. S. 421, 81 S. Ct. 200, 5 L. Ed. 2d 169. The warranty of workmanlike performance has been held to be comparable to a manufacturer's warranty of the soundness of its manufactured product. *Ryan Stevedoring Co.* v. *Pan Atlantic SS Corp.*, Supra, at pages 133, 134. The warranty is breached when the warrantor, in this case Maher, created an unsafe condition or otherwise had notice of that condition and thus the opportunity to eliminate or avoid it but failed either to remedy the situation or cause its employees to refrain from working while the unsafe condition persisted. *Misurella* v. *Isthmian Lines, Inc.*, 328 F. 2d 40 (2 Cir. 1964); *Nicroli* v. *Den Norske*, 332 F. 2d 651 (2 Cir. 1964). Even if the condition were created by the vessel, the stevedore is liable for indemnity if workmanlike performance would have eliminated the risk of injury. *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421 (2 Cir. 1962). Once the stevedore created the condition or knew of its presence, it was obliged under the law to remedy the hazard. *Tedeschi* v. *Luckenbach S.S. Co.*, 334 F. 2d 628 (2 Cir. 1963); *Misurella* v. *Isthmian Lines, Inc.*, supra. There can be no dispute that under the proof Maher created unsafe working conditions and surely had notice of it through its employees, including the plaintiff, who had no place of sanctuary as an ever treacherous heavy suspended draft was being lifted overhead from the square of the hatch. At the very least, the stevedore, chargeable with constructive notice of the dangerous condition through its employees, *Nicroli* v. *Den Norske*, supra, should have suspended the discharging operation thus avoiding injury and damage. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (9 Cir. 1949) cert den., 338 U.S. 904 70 S. Ct. 307, 94 L. Ed. 557. Even if the hazard were created by the negligence of another, the stevedoring firm is liable for

indemnity if workmanlike performance would have eliminated the risk of injury. *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421 (2 Cir. 1962). Liability should fall upon Maher, the party best able to adopt preventative measures but who failed to do so. *Italia Societa per Azione di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732.

Isco, charterer, if required to indemnify Chios, shipowner, is entitled to indemnity from Maher for all such sums paid by Isco to Chios, including reasonable costs and counsel fees incurred by the charterer in the defense of the third-party action in Chios. *DeGioia* v. *United States Lines Co.*, supra; *Paliaga* v. *Luckenbach Steamship Co.*, 301 F. 2d 403 (2 Cir. 1962). In this, a shipowner-time charterer-stevedore indemnity action, Isco, as charterer, is entitled, in its indemnification by Maher to reimbursement for reasonable costs and counsel fees incurred by the charterer in its defense of the third-party action maintained by Chios.

POINT II

The contentions of the stevedore and the shipper that the Trial Court committed prejudicial procedural errors in the trial of the indemnity actions against them are without merit.

(a) Maher, the stevedore, and Castle & Cooke, the shipper, urge that the Trial Court committed prejudicial error by its failure to afford counsel for these parties the opportunity to make objections to the Court's instructions to the jury and the special questions to be answered by the jury on the third party claims over prior to the jury beginning its deliberation. Importantly, Maher and

Castle & Cooke fail to point out that the Trial Court had ruled on the stevedore's and the shipper's requests and that both these parties had been given thereafter blanket exceptions to the Court's charge (504a, 507a). The Court's instructions to the jury on the third party claims against the stevedore and shipper as evidenced by a reading of that charge were proper and in conformity with the law relative to the respective warranties and liabilities of these third and fourth party defendants as is fully set forth in Point I of this brief and the brief of Chios, appellee.

It is most significant with respect to the subject of the special questions submitted to the jury for their consideration on the indemnity claims against the stevedore and the shipper that there had been extensive discussions between the Court and all counsel relative to the proper framing of the special questions ultimately submitted to the jury on the third-party indemnity questions against the stevedore and shipper. During these protracted discussions, counsel for Maher expressed objection to the form of special question no. 1 and the basis for counsel's objection and his position was duly noted and ruled upon (697, 698)* and the Court otherwise ruled on the remaining special questions as framed, all with the noted objections of counsel for Maher and Castle & Cooke (699-704).* Although Rule 50 F.R.C.P. requires in substance that the Court afford counsel an opportunity to object to an instruction and state the basis for said objection when the basis for the objection is made on proper grounds, there can be no prejudicial error whatsoever when the Court, as in this case, was fully aware of the positions of the stevedore and the shipper, which had been expressed and argued during the trial in the many colloquies between

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* Refers to pages of original transcript.

counsel and the Court and in the parties requests to charge and where the charge with respect to the claims for indemnity against the stevedore and shipper were proper under the law. *United States* v. *Certain Interests in Property in the Borough of Brooklyn*, 326 F. 2d 109 (2 Cir. 1964).

The purpose of Rule 51 F.R.C.P. is to enable the Court, if need be, to correct its charge. Here the redundantly stated objections of the stevedore and the shipper were made after the jury retired to deliberate on the third party claims but there remained ample time for further instruction if needed. However, that was not necessary in view of the Court's proper charge to the jury on the third party claims against the stevedore and shipper. The Trial Court was fully aware of the respective positions of the shipper and with respect to Maher's objection to the inadequacy of the special questions of the Court said:

> "We spent how many hours this morning on this matter of developing these questions and the charges? I had no intention of charging the jury any further. We spent from 11.00 o'clock this morning. It was before 11:00 I think we started. Certainly, it had at least 11:00 to 2:00. We spent time last night. I don't know how many hours last night pounding out these problems so that even if you had excepted, I had no intention of charging the jury further not after spending 5 or 6 hours with the lawyers trying to iron this out.
>
> You knew what I was going to charge and you have made your exceptions . . ." (506a, 507a)

(b) Maher assigns error to the Trial Court's failure to place before the jury the issue of the charterer's liability and despite this failure, charterer's counsel was per-

mitted summation. This case was a jury case for all purposes and the Court overruled Maher's objection on this subject and adopted the position of the charterer that all issues were for the jury (427a), Rule 39(b) F.R.C.P. As the record amply reflects, the charterer's interests were indeed in jeopardy and this liability was to be determined by the fact finders in passing on the issue of the stevedore's breach of warranty and the shipper's liabilities. In essence, the jury was called upon to determine whether or not the stevedore had breached its warranty and thus the liability of the stevedore to the shipowner and charterer and the charterer's liability in turn to the shipowner was dependent upon the resolution of special questions 1-7. Surely, counsel for the charterer with its liability to the shipowner "on the line" was permitted properly to argue its indemnity claims against not only Maher but the shipper. Maher's argument otherwise is made of wholecloth. The issue of charterer's liability was tried throughout this case and with the Court's specific charge, that the charterer was primarily responsible for the discharge of cargo from the vessel, which is assigned as error in the brief of charterer as appellant against Chios, it would have been substantial prejudicial error to bar counsel for the charterer to sum up to the jury. In any circumstance, the brief summation of counsel for the charterer on the issues of the liabilities of the stevedore and the shipper would amount to nothing more than harmless error.

(c) Stevedore complains that prejudicial error was committed in the Trial Court by the failure of the interrogatories, presented to the jury in its determination of the third party indemnity claims, to include an option for the jury to find that the shipowner did not meet his burden of proof. This argument is simply overcome by a reading of that portion of the Trial Court's instructions to the jury as follows:

> ". . . Now, as I have said, in their claims against the stevedoring company, the shipowner and these other parties have the burden of establishing that claim by a fair preponderance of the credible evidence. Thus, even though you have found in favor of the plaintiff in an action against the shipowner, you may not find in favor of the shipowner against the stevedoring company unless you find by a fair preponderance of the evidence that the plaintiff met with his accident because of the failure of the stevedoring company to perform its job of providing a place for plaintiff to get out of the way or failed in its duty of properly unloading the pallet from the ship in a workmanlike manner and with reasonable safety to persons and property . . ." (485a)

This language expressly properly instructed the jury on the burden of proof required of those parties claiming indemnity and could not create an impression to the jury that indemnity had to be granted with no other option.

AS TO CASTLE & COOKE, SHIPPER

The judgment below granted indemnity, including reasonable costs and counsel fees in favor of Chios, shipowner, and Isco, time charterer, against Castle & Cooke, shipper.

The charterer adopts the position of Chios, shipowner, and joins in the shipowner's answering brief to the appeal of Castle & Cooke, shipper, from the judgment below requiring it to indemnify both the shipowner and the charterer.

CONCLUSION

The judgment below granting indemnity, including reasonable costs and counsel fees in favor of the shipowner and the charterer against the stevedore and the shipper should be affirmed. Of course, if Maher be absolved, the third party complaint of the shipowner as against the charterer should be dismissed and judgment entered accordingly.

Respectfully submitted,

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WILLIAM P. LARSEN, JR.
Of Counsel

Service by mail of three (3) copies of Brief for 3rd Party Def Appellee
and waiver
hereby admitted this 13 day
of May, 1976

Attorney for Fourth Party Def Appellants

Brief for 3rd Party Def Appellee

in

13th

MAY 6

McHugh, Heckman, Smith & Leonard

30 Party Def-Appellant

5-13-76

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